Notes on Foreign Law

THE following notes are taken from the foreign reports and reviews that happen to be available. No attempt has been made to summarize the contents of these reviews, and only a few points of the many that an American lawyer might find interesting have been selected. In making this selection the writer can claim no guide other than an admittedly fallible judgment.

The perennial conflict between the English common law and the Roman law is most fully exhibited, as is quite natural, in the Union of South Africa, which long ago established the Roman Dutch law as the cornerstone of its legal edifice, but which can scarcely disregard the English influences which pour in because of the political and economic relations of the commonwealth.

In the South African Law Journal for February, 1919, Mr. Dalton has an article on the "Passing of the Roman Dutch Law in British Guiana." Guiana was originally a Dutch colony, but ever since the reorganization of the judiciary under English control in 1831, the principles of English law, first by way of rules of evidence and then by further statutory regulation, were made to supersede the existing Roman Dutch law. Finally, on January 1st, 1917, a statute was put in force specifically changing the legal system "from Roman Dutch to English." The editor of the Journal in an editorial[1] obviously deplores the successive tinkering that has produced this result, and points to the moral for South Africa.

As a matter of fact most of the notes collected under the heading "Notes on Some Controverted Points of Law"[2] turn on this same rivalry of legal systems. So in McKise v. Martens[3] a master was held liable for torts committed by his servant, although the Roman Dutch law is to the opposite effect. Again

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[1] At p. 51.

[2] 35 South African Law Journal, 25, 407, and 36 South African Law Journal, 30 (1918-1919).

[3] (1914) A. D. 382, 35 South African Law Journal, 25.

in Bloom v. American Swiss Watch Company[4] a reward had been advertised for the performance of an act. The claimant performed it in ignorance of the advertisement and was not allowed to recover the reward. This may be good common law, but the editor is entirely correct in his argument that by Roman law it was *dolus* to refuse the reward. In Wright v. Demerara Turf Company,[5] decided in Guiana, while still under the Roman Dutch law, the seller in an auction not stated to be "without reserve," was held bound to accept the highest offer, whereas in South Africa the common law doctrine was in vogue.[6] And in the testamentary cases discussed[7] it is stated that the introduction of English executorship has largely superseded or at any rate seriously modified the Roman law of inheritance.

But the most common conflict is that in which the question of the English "consideration" and the Roman *"causa"* are involved. In his admirably thorough discussion of "Causa and Consideration in the Law of Contracts,"[8] Professor Lorenzen speaks of the conflict in the South African cases between the courts of the Cape, which held *causa* and consideration to be the same and applied the common law on this point, and those of the Transvaal and Ceylon and other regions which held the two were different and applied the Roman doctrine; a view which Professor Lorenzen found confirmed in the recent case before the Privy Council of Jayawickreme v. Amarasuriya.[9] Now in this case, which will be mercifully referred to hereafter as the Ceylon case,[10] the Privy Council unquestionably based its decision upon the Roman Dutch rule that a *justa causa debendi* alone was required, and that this term was considerably more extensive than the English consideration. But as a matter of fact the agreement of the plaintiff to withdraw a suit she had threatened to bring, on a claim she bona fide believed to be valid, would have been excellent consideration, even before the English law. Lord Atkinson specifically points this out, and on this ground alone would have reversed the ruling of the Court of Appeal to the effect that the actual invalidity of the so-called "trust" on which the plaintiff relied rendered the com-

[4] (1915) A. D. 100, 35 South African Law Journal, 30.
[5] (1915) 35 South African Law Journal, 161.
[6] Maasdorp's Inst. of Cape Law, 3, pp. 141, 189.
[7] 38 South African Law Journal, 33.
[8] (May, 1919) 28 Yale Law Journal, 621.
[9] (1918) 119 L. T. Rep. 499.
[10] Fully reprinted in 36 South African Law Journal, 54-61.

promise worthless as a consideration. On the facts actually presented, accordingly, the Privy Council need not have raised the question of *causa* or consideration, since the promise would have been obligatory in either system.

Finally in an interesting note on the "Doctrine of Consideration,"[11] a brief review of its history in South Africa is given. That becomes especially important in view of the surprising decision of Mr. Justice Kotze in the case of Thorn v. Behr.[12] Justice Kotzé deliberately rejects the rule, regarded as established in Cape Colony, that consideration (in the English sense) is necessary to support a contract. And he does so in conscious defiance of the cases cited in support and the apparent unanimity of the text writers. It is "an alien principle" and "bad law." He returns to the Roman Dutch doctrine of *causa*.

The editor of the Journal[13] justly doubts whether the "alien principles introduced into our (i. e. Roman Dutch) law" can be so summarily ejected. But it is clear that in view of this case, if it should be followed, it cannot quite be said that the Cape courts have accepted consideration while courts of similar kind retain *causa*. If the strong nationalist aspirations which are agitating the Union rouse other aggressive defenders of the established system, the old war between "civilians" and "common lawyers" which once raged in England has been carried to South Africa with a vengeance.

On the subject of *causa* attention may be called to an article running in the current (1919) volume of the Madrid *Revista general de Legislacion y Jurisprudencia* by M. M. Traviesas; *"La causa en los negocios juridicos."*[14] Señor Traviesas undertakes a most exhaustive examination of the theoretical discussion of the question in German law, reviewing Klingmiller, Fitting, Hotmar, Karlowa, Dernburg, Windscheid, Lenel and Leonhard; the French theories in the standard manuals of Planiol, Aubry-Rau and Baudry-Lecantinerié-Cheneaux as well as the view of Saleilles; the Italian doctrine as set forth by Simoncelli, Ferrini, Chironi, and Coviello and finally[15] he begins the discussion of the term in the Spanish Code.

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[11] 35 South African Law Journal, 409.
[12] Idem, p. 414. The case was decided Aug. 27, 1918, and is not yet reported.
[13] Idem, at p. 413.
[14] January, pp. 28-37; February, pp. 211-227; March, pp. 320-338; April, still incomplete.
[15] P. 325 and ff.

It may be noted in passing that Carboni[16] asserts that the German Code, although apparently ignoring the term, recognizes *causa* in sections one hundred and nineteen, one hundred and thirty-eight, and eight hundred and seventeen.

Those who are interested in the sociological and ethical aspects of law will note the work of M. Anthony on *"La Force et le Droit."*[17] It is a vigorous polemic against the doctrine that superior force can create rights of any sort.

In the first issue the *Bulletin Mensuel de la Soc. de Leg. Comp.* for 1919 the speech of M. Lévy-Ullman of Lille at the meeting of the society on December 19, 1918, is quoted *in extenso*. M. Lévy-Ullman's subject was "How should a Frenchman undertake the study of Anglo-American law?" In the interests of the mutual comprehension which, it is hoped, will be the basis of the new world polity, it is of the highest value to see how the ideas that we regard as fundamental present themselves to a trained mind accustomed to view our problems from a wholly different angle.

M. Lévy-Ullman presents the striking differences that exist between the French and English systems—the immense volume and variety of the Anglo-American statutory law, the great contrast existing between the terminologies and frame-work of the two systems. He then suggests that a study of the Anglo-American law be begun by the examination of the various systematic works on jurisprudence; Holland, Markby, Salmond, Amos and others. Professor Lévy-Ullman knows them all, and his criticism of them is remarkably just and accurate. He pays his compliments to "l'infatigable M. Edward Jenks," to "l'éminent Sir Frederick Pollock" and "le regretté professeur Maitland." On pages ninety-five to ninety-seven he gives a general summary of the legal literature which includes text-books, "practise books," reports, dictionaries and cyclopedias, commentaries, histories of law and lawyers, reviews and ancient authors.

It is obvious, however, that although M. Lévy-Ullman knows the difference between the attitude of Anglo-American lawyers and French lawyers towards judicial precedents, he does not give sufficient warning thereof to his audience. If the English or American lawyer is too much inclined to disregard abstract

[16] Quoted at p. 333.
[17] Reviewed in *Rev. Gen. du Droit, de la Leg. et de la Jur.* (1919) p. 56.

and general discussion and confine his legal argumentation to the mechanical citation of precedents, no such charge can be brought against his French colleague. To advise a French jurist to begin his examination of English-American law with a book on general jurisprudence seems a work of supererogation. M. Decugis, who had the great advantage of having actually practised law in England in Lord Reading's office, warmly supported the general suggestions of Lévy-Ullman, but gave the sound and practical advice that the one indisputable means of acquiring the spirit of the English and American law was *"vivre dans l'ambiance"*—direct and personal contact with law in its practical and living application.

It must be said that M. Decugis and apparently the audience, were not moved by M. Lévy-Ullman's eloquence to the point of admitting the equality of the English to the civil law. "The former," says M. Decugis, "is an interesting system, but it is none the less inferior (to the civil law) both in scientific and in practical value."

The rule of the Roman law that masters are not liable for the torts of their servants, which, as has been said, is still generally in force in countries of the Roman Dutch law, has been abrogated by the French Code, and in those countries where the codes have been based on the French; section thirteen hundred and eighty-four of the French Civil Code providing that "masters and employers (*commettants*) [are responsible] for damage caused by servants or employees while performing duties for which they are employed, even if the performance is improper (*dans l'exercice, même abusif, des fonctions auxquelles ils les ont employés*)."

This section is applied in a recent case before the *Cour de Cassation,* Porte v. Bard and the Taximètre Company,[18] in which the injuries were caused by a chauffeur while in the company's garage, although the chauffeur was at the time not performing any duties for the company, but was amusing himself with part of the cab's accessories. The German Code[19] has a similar provision, but allows the employer to defend on the ground that

[18] D. P., 1919, 1, 8.
[19] § 831.

he has exercised due diligence in the selection of the employee and in equipping him with material and place. In this it is followed by the Japanese Code.[20]

An important Italian decision on consent and the "meeting of the minds" is the case of Motta v. Molla in Turin.[21] The parties apparently entered into what was seemingly a contract to sell realty, but which was in fact intended to cover the establishment of an annuity in favor of the plaintiff. The defendant admitted the invalidity of the sale but was willing to carry out the transaction in accordance with its original purport; that of an annuity. The court declared the entire transaction void, both as a sale and as an annuity, in spite of the maxim *plus valeat quod agitur quam quod simulate concipitur.*

In Bucher v. Vitali[22] an innkeeper was held liable for the theft of an article belonging to a guest, although no negligence on the part of the innkeeper was alleged or proved. The room in which the theft occurred was one to which the hotel servants had access. The court based its decision on the ground that such loss is part of the risk the innkeeper assumes by engaging in that business. It is interesting to see how the court in this point is approximating the common law theory of an innkeeper's liability whereas in our jurisdiction statutes have in effect nullified it.

It is common even at the present time to hear the right of courts to declare a law unconstitutional, challenged as a usurpation. It may therefore be worth while noting that the question has arisen abroad and has been extensively discussed there.

Mr. Nicholas Stolfi of Turin, in the general part of his Diritto Civile (p. 507), confines the powers of an Italian judge solely to the determination of whether the text of a law cited is, as a matter of fact, the law actually passed by the legislature, and expressly repudiates what he considers the American practice of examining the constitutionality of the law. His opinion is based on the fact that the Italian constitution has no special procedure for amendment, and that consequently any duly passed statute amends the constitution.

The validity of this inference is questioned by his reviewer,

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[20] § 715.
[21] *Giur. Ital.* I, 1, 22, *seq.*
[22] *Giur. Ital.* 1919, I, 1, 173

Professor Perreau of Toulouse,[23] who points out also that the power to pass on the constitutionality of laws is not exclusively American. The courts of Rumania,[24] Norway,[25] and Greece,[26] have at various times assumed the same powers.

The Rumanian decision cited by M. Perreau was much discussed in France. It is given in full with valuable notes and comments of M. Benoist in the Revue du Droit Publique.[27] It examines the American practice in great detail and analyzes it correctly. There is a common misconception in Europe that only the Supreme Court has the power of declaring laws unconstitutional. The court properly corrects this.[28]

M. Benoist refers to the spirited discussion of the matter in the French assembly during the Revolution and to Sieyès' proposal to establish an elective jury to pass on the constitutionality of laws.

Besides the countries cited by M. Perreau, it seems that Mexico, Argentine, Brazil, Canada, Australia and Austria have given their courts this power by statute.

In France, it appears that the authorities are in conflict. The right of the legislature to amend the Constitution *implicite,* by simple statute, is called a usurpation by Perreau and Hauriou,[29] and the authority of the courts to reject a law or prevent its enforcement is much disputed. The authorities pro and con are cited by Sirey, *Table dècennale,* 1900-1910, Lois, No. 2.[30]

The Court of Cassation held that the court could not even investigate whether the law was properly passed.[31] The Council of State ruled that a judge might reject a law as unconstitutional, if it derogated from the principles of the constitution, even if these principles are established by usage.[32] It is curious to note

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[23] Rév. Gén. du Dr., de Lég. et de la Jur., vol. 43, pp. 172-176. (1919). It is from this review by Perreau, that much of the information in the above note is derived.

[24] Trib. a Ilfov., Feb. 2, 1912. (Note of N. Berthélemy, Sirey, 1912, 4, 9.) Cass. Rumania, Mar. 16, 1912, Sirey, 1912, 4, 28.

[25] Sup. Court Norway, June 3, 1890, Court of Christiania, Feb. 2, 1893 (cited Sirey, 1912, 4, 11 n. 3).

[26] Areopagus, 1904, No. 145. Rév. Dr. Pub. 1905, p. 841. Court of Athens, 1904, No. 1470, 1906, p. 795.

[27] 1912, pp. 138-156, 479.

[28] Compare on the whole question the book of J. Signorel, Le Control du pouvoir legislatif.

[29] Hauriou, Principes de droit public (1916) pp. 681-688.

[30] Also not of Berthélemy, Sirey, 1912, 4, 9, Sirey 1909, 3, 143, § 3. Sirey, 1913, 3, 137. Haurion l.c.

[31] Sirey, 1906, 1, 301.

[32] Sirey, 3, 307.

that these two rulings which in France appear to be the extremes of mutually irreconcilable positions, are both accepted by our courts as equally valid.[33]

There is the additional point that in France and Italy, certain administrative acts have the force of laws. In a recent case of Guillon v. the Prefect of the Seine,[34] the court nullified an ordinance of the prefect on the ground of "illegality," which in this case meant trangression of his legally determined powers. In the course of the decision, the court referred to these ordinances as having the force of laws. President Sarrut who presided at the appeal, criticizes the language as inaccurate, since, if these ordinances had the force of law, the Court of Cassation, he holds, would be powerless to annul them or even to examine their validity:—*"puisque le pouvoir judiciaire n'exerce aucun contrôle sur la légalité des lois."*[35]

Mr. Stolfi in the book quoted believes that in Italy the courts are powerless both as regards ordinary administrative acts and those that by delegation or statute have the force of laws.

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[33] Field v. Clark (1892) 143 U. S. 649, 36 L. Ed. 294; County of Yolo v. Colgan (1901) 132 Cal. 265, 64 Pac. 403.

[34] Oct. 24, 1917, Dalloz, P. 1918, 1, 6.

[35] Sirey, 1917, 1, 145.